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ENVIRONMENTAL LAW

Expert Analysis

Obama Reelection Clears Path For Numerous New EPA Regulations

The reelection of President Barack Obama means that a long list of new regulations will be issued by the Environmental Protection Agency (EPA) in the coming months. Some had been held up because of their political sensitivity, and others were still in process, but many will soon be ready for further action.

The election results also mean that major new environmental legislation is very unlikely for the next two years. The House of Representatives is still firmly controlled by the Republicans, and their leadership has not signaled any major change from the last Congress' stance of opposition to many EPA activities. The Democrat majority in the Senate has increased by two seats, but it still lacks the 60 votes necessary to overcome a filibuster. Congress has not enacted a major new environmental statute since 1990 (the year of the Oil Pollution Act and the Clean Air Act Amendments), and this paralysis will now continue until at least 2015.

There is one conceivable exception. With the looming fiscal cliff, the possibility of a carbon tax is being discussed in some circles. It would raise a great deal of revenue and would allow some other taxes to be lowered or eliminated. It would almost certainly be accompanied by the elimination of EPA's authority to regulate greenhouse gases (GHGs) under the Clean Air Act. The odds of a carbon tax actually being enacted soon appear low, however, and this column assumes that will not occur. Instead, this column will discuss the important EPA regulations that are in the pipeline.

Air Pollution

GHG emissions from new electric generating plants. On March 27, 2012, EPA announced proposed new regulations setting GHG standards

By
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for new electric generating plants. The standards could be met by modern natural gas-fired plants. They could not be achieved by coal-fired power plants unless they were equipped with carbon capture and storage, a technology that is not yet commercially available. The low price of natural gas, coupled with other environmental rules and litigation, had already led to a virtual halt in the construction of new coal-fired power plants, but this new regulation would add an additional very steep barrier to such plants.

EPA is conducting a major study of the practice of hydraulic fracturing, in view of the concerns that have been expressed over its impacts on water pollution, air pollution, and other areas.

EPA has received a very large volume of comments on the proposed regulation, and it plans to issue the final rule by April 12, 2013. Even in advance of the rule becoming final, the developers of several new coal-fired plants have filed suits, now called *Las Brisas Energy Center, LLC v. EPA*, challenging the draft rule and saying its very pendency is damaging them.

EPA is also preparing rules for GHG emissions from petroleum refineries, but there is no established schedule.

GHG emissions from existing electric generating plants. Under Section 111(d) of the Clean Air Act, EPA has the authority to regulate

GHGs from existing plants. It could not do so directly; instead it would need to issue standards that the states would have an opportunity to implement, and then if the states failed to do so, EPA could move in. Unlike the standards for new plants (which have limited practical impact so long as natural gas prices remain low), standards for existing plants could be quite significant. EPA has not announced what these standards will look like or when they will be announced; since existing coal-fired power plants are the largest source of GHGs in the United States, such standards are likely to receive a great deal of attention in the second Obama term. However, on Nov. 13 Gina McCarthy, EPA's assistant administrator for air and radiation, told the National Association of Regulatory Utility Commissioners that implementation of any such rule is at least several years away.¹

Boiler MACT. Under the program of National Emission Standards for Hazardous Air Pollutants (NESHAPs), EPA issues standards for the Maximum Achievable Control Technology (MACT) for various types of emission sources. EPA has been developing MACT standards for mercury and other emissions from industrial boilers and incinerators since 2003. It issued a proposed rule in 2004, but it was struck down in court in 2008. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). EPA published a new rule in March 2011 under a court-ordered deadline, but quickly said it was reconsidering the rule. The final rule is expected in the next few months.

Utility MACT. In December 2011, EPA issued the "Utility MACT" rule, which sets limits on mercury, acid gas and other toxics from new electric generating units. (It is sometimes referred to as the MATS rule.) Industry complained that these new rules were much too stringent, and EPA agreed to reconsider certain aspects of them. EPA released a proposed revised rule on Nov. 16 and has told the court it will issue the final revision by March 2013. Other aspects of the rule are already in effect, and industry has instituted litigation.

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Portland Cement NESHAP. EPA is reconsidering the NESHAP for Portland cement manufacturing. It issued a proposed rule in August 2012, and plans to issue its final rule in late December.

Ozone NAAQS. The National Ambient Air Quality Standard (NAAQS) for ground-level ozone has been the subject of great controversy for several years. Under President George W. Bush, in 2008 EPA set a NAAQS for ozone of 75 parts per billion. EPA launched a review of the standard when Obama took office. EPA's Clean Air Scientific Advisory Committee reported in 2011 that the standard does not fully protect the public health. EPA was on the verge of tightening the standard, but on Sept. 2, 2011, the president directed EPA to conduct further studies before doing so, due largely to concerns about the economic impacts. This action was extremely unpopular with the environmental community.

EPA is now conducting further studies, and is scheduled to issue new standards in July 2014. Meanwhile, on Nov. 16 the U.S. Court of Appeals for the D.C. Circuit heard argument in a case called *State of Mississippi v. EPA*, Case No. 08-1200, filed May 23, 2008, in which the 75 parts per billion standard is being challenged by environmental and health groups and several states as too weak, and by industry groups as too strong. One possible outcome of that case is that EPA could be put under a schedule to issue a revised standard earlier than July 2014.

Particulate Matter NAAQS. EPA issued draft new NAAQS for fine particulates (PM 2.5) and coarse particulates (PM 10) in June 2012, and it is now under a consent decree obligation to issue the final standards by Dec. 14, 2012.

Tier 3 Vehicle and Sulfur Rules. EPA is considering a set of rules, called the Tier 3 rules, that would reduce the permissible content of sulfur and certain other pollutants in gasoline, and regulate emissions of these pollutants from new motor vehicles and engines. EPA announced the contemplated Tier 3 rules in June 2012, but has not formally published them.

Cross-State Air Pollution Rule. This was a major rule issued in August 2011 regarding sulfur dioxide and nitrogen oxides pollution from stationary sources in the eastern and midwestern states. The D.C. Circuit invalidated the rule in August 2012, leaving in effect the Clean Air Interstate Rule, which that court had ruled invalid (but left in place) in 2008. EPA is seeking en banc review of the new decision; if EPA does not prevail here, or in a subsequent certiorari petition to the Supreme Court, it will need to go back to the drawing board with these rules.

New Source Performance Standards (NSPS). EPA is developing or revising NSPSs for how much

air pollution may be emitted by facilities in various industrial sectors. The revision for the NSPS for New Residential Wood Heaters is projected to be issued in December 2012. NSPSs are also in process for emissions from commercial and industrial solid waste incineration facilities, and from the mineral wool and wool fiberglass industries.

Water

Hydraulic fracturing. EPA is conducting a major study of the practice of hydraulic fracturing, in view of the concerns that have been expressed over its impacts on water pollution, air pollution, and other areas. A draft report is expected in 2013; if the report finds that hydraulic fracturing leads to significant methane emissions, EPA restrictions on those emissions could follow. During the campaign, Obama repeatedly expressed his support for this practice, but EPA is preparing rules that will regulate it. The first is likely to concern Health and Safety Data Reporting under the Toxic Substances Control Act; an Advance Notice of Proposed Rulemaking is projected for December 2012.

Coalbed Methane. EPA is developing oil and gas effluent guidelines to establish requirements for discharges from the extraction of coalbed methane to address pollution of surface water and soil from produced water. Proposed amendments are projected to be published in June 2013.

Cooling Water Intake Structures. Under a settlement with Riverkeeper and other organizations, EPA must take final action on this proposed rule under Section 316(b) of the Clean Water Act by July 2013.

Concentrated Animal Feeding Operations (CAFOs). EPA is revising its rules to expand the universe of regulated CAFOs and to provide more stringent permitting requirements for applications of waste and produced water. The revision is expected in May 2013.

Wetlands. A series of Supreme Court decisions, most importantly *Rapanos v. United States*, 547 U.S. 715 (2006), has led to great confusion about the extent of federal authority over isolated waters, intermittent streams, and certain other areas. EPA and the Corps of Engineers have been working on guidance to clarify what lands are federally regulated, and in the second Obama administration this guidance may be issued.

Stormwater. EPA is developing rules on stormwater discharges from newly developed and redeveloped construction sites. These rules are expected some time in 2013.

Hazardous and Solid Waste

Coal Ash. Coal-fired power plants generate large quantities of coal ash. For many years there

has been ambiguity about the status of this ash under the Resource Conservation and Recovery Act (RCRA). This issue took on higher priority when the dike holding back a massive amount of coal ash at a Tennessee Valley Authority plant in Tennessee burst in December 2008.

In June 2010, EPA announced several possible approaches; under one of them, coal ash would become a "special waste" under RCRA, which would subject it to extremely expensive handling requirements. This became quite controversial. EPA sent the new coal ash standard to the Office of Management and Budget for regulatory review in March 2012. In October 2012, EPA announced that due to new data and the subsequent need to complete revisions of toxicity characteristics and toxicity characteristic leaching procedure regulations, October 2013 is the earliest the standards will be ready.

NEPA and GHGs

One important action would come from the Council on Environmental Quality (CEQ), a unit of the Executive Office of the President, rather than EPA. In February 2010, the council issued proposed guidelines for the consideration of GHG emissions under the National Environmental Policy Act (NEPA). It received extensive comments, but has not issued final guidance. The final version may come in the next few months.

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1. Jessica Coomes, "McCarthy Says Any Greenhouse Gas Rule For Existing Plants Still Several Years Away," *Daily Environment Reporter* (BNA), Nov. 14, 2012 at 1.